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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JACKIE DEAN OJEDA,
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Petitioner,
v.
STATE OF CALIFORNIA, Warden
Respondent.

Civil No. 06-1035 H (JMA)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than August 25, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

FAILURE TO NAME PROPER RESPONDENT

Further, review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule

1 2(a), 28 U.S.C. foll. § 2254). “The ‘state officer having custody’ may be ‘either the warden of
2 the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state
3 penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note).

4 Here, Petitioner incorrectly named the “People of California” as Respondent. In order
5 for this Court to entertain the Petition filed in this action, Petitioner must name the warden
6 currently in charge of the state correctional facility in which Petitioner is presently confined or
7 the Secretary of the California Department of Corrections and Rehabilitation. *Brittingham v.*
8 *United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

9 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES**

10 Further, habeas petitioners who wish to challenge either their state court conviction or the
11 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
12 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the
13 exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest state
14 court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains
15 available.” *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404
16 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly
17 exhaust state court remedies a petitioner must allege, in state court, how one or more of his or
18 her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that
19 an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed
20 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state
21 court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

22 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
23 Supreme Court. In fact, he specifically indicates he did not seek review in the California
24 Supreme Court. (See Pet. at 6-9.) If Petitioner has raised his claims in the California Supreme
25 Court he must so specify.

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Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not alleged exhaustion of state court remedies.

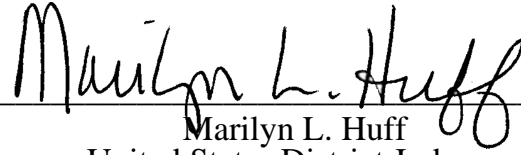
CONCLUSION

Accordingly, the Petition is **DISMISSED** without prejudice for failure to satisfy the filing fee requirement; failure to name a proper respondent; and failure to allege exhaustion of state judicial remedies. In order to have this case reopened, Petitioner must, **no later than August**

1 25, 2008, (1) either pay the filing fee or provide adequate proof of his inability to pay and (2)
2 file a First Amended Petition which cures the pleading deficiencies outlined above. *For*
3 *Petitioner's convenience, the Clerk of Court shall attach to this Order, a blank application to*
4 *proceed in forma pauperis form and a blank First Amended Petition form.*

5 **IT IS SO ORDERED.**

6 DATED: July 7, 2008

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Marilyn L. Huff
United States District Judge